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No. 84-373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JUAN CORCHADO JUARBE, Director,
Bureau of Special Investigations of the
Puerto Rico Department of Justice,

Petitioner,

v.

FRANCISCO APONTE PEREZ, Chairman, Judiciary
Committee of the Puerto Rico Senate, and
HECTOR RIVERA CRUZ, Director, Legislative
Investigation Unit of the Puerto Rico Senate,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. Do federal principles of legislative immunity, which the court below applied, prevent the courts from enforcing subpoenas issued by the Executive Branch demanding that legislative officials make available physical and documentary evidence gathered as part of a legislative investigation so that the Executive Branch can investigate and prosecute official misconduct by Executive Branch employees?

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No. 84-373

JUAN CORCHADO JUARBE, Director,
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Petitioner,

v.

FRANCISCO APONTE PEREZ, Chairman, Judiciary
Committee of the Puerto Rico Senate, and
HECTOR RIVERA CRUZ, Director, Legislative
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents respectfully request this Court to dismiss the petition for a writ of certiorari for lack of jurisdiction or, in the alternative, to deny the writ in the exercise of its discretionary jurisdiction.

JURISDICTION

Petitioner predicates this Court's jurisdiction on 28 U.S.C. Sec. 1258(3). He alleges two separate grounds for his jurisdictional assertion:

1. That in interpreting Art. III, Sec. 14 of the Puerto Rico Constitution, which creates legislative immunity

for the Legislative Assembly of Puerto Rico, the Puerto Rico courts relied on their understanding of federal constitutional law under the Speech or Debate Clause of the United States Constitution. Art. I. Sec. 6.

2. That, in any event, the scope of legislative immunity for Puerto Rican legislators is itself a question of federal law arising under the Puerto Rican Federal Relations Act. 48 U.S.C. secs. 732 *et seq.* (hereafter "PRFRA").

As will be discussed more fully below, it is respondents' contention that this Court lacks jurisdiction over the petition for certiorari since petitioner's jurisdictional claims are frivolous and since the only issues presented are solely issues of Puerto Rican constitutional law.

STATEMENT OF THE CASE

The petition for a writ of certiorari is the latest salvo in a prolonged legal battle between the Executive and Legislative Branches of Puerto Rico, stemming from the assassination by Puerto Rican police on July 25, 1978 of two young advocates of independence for Puerto Rico. The events occurred on a remote mountain in rural Puerto Rico, Cerro Maravilla, where the deceased were led by an undercover agent of the Puerto Rico police, presumably, to commit acts of terrorism, although they were woefully ill-equipped for the task.[1] At the precise moment when these events occurred, the Governor of Puerto Rico was delivering a forceful pro-statehood speech at the official celebration of Commonwealth Day.

The Governor promptly labeled the policemen present at Cerro Maravilla "heroes" and two quick, successive

[1] These "men believed to be terrorists who intended to seize and to blow up a large television relay tower located on the mountaintop" (Pet. 5), had in their possession a pair of gloves, two handguns, a ski mask, a package of solid charcoal starter and a box of matches. See the press articles cited on page 5 of the Petition.

"probes" by the Puerto Rico Department of Justice absolved them of all responsibility and held that they acted in self-defense. Two equally incomplete investigations by the United States Department of Justice reached the same results.

Unconvinced by the results of these probes and alarmed by their unprofessionalism and by the egregious contradictions in the testimonies of ocular witnesses, the Puerto Rico Senate decided to launch its own investigation of the matter and entrusted it to its Judiciary Committee, chaired by respondent Aponte Pérez. The Committee promptly hired an experienced investigator, respondent Rivera Cruz, who for more than a year labored quietly but tenaciously, interviewing witnesses, gathering evidence and reviewing the reports of the four previous local and federal probes. Thereafter, respondent Rivera Cruz proceeded to present the results of his investigation to the Committee, via televised hearings. For a judicial recognition of the impact of these hearings on the Puerto Rico public opinion, see *Colón Berríos* v. *Hernández Agosto*, 716 F. 2d 85, 86 (1st Cir. (1983).

The Senate investigation completely destroyed the conclusions of the four official probes. Relying on the testimony of ocular witnesses whom the previous local and federal investigators had slighted or disbelieved, of expert witnesses and of three policemen who participated in the Cerro Maravilla stake-out and testified under immunity, the Senate proved to all who wanted to see and hear that the policemen in Cerro Maravilla apprehended the young men, beat them up and executed them by firing squad while the victims knelt, handcuffed.[2]

The investigation, moveover, showed conclusively that there had been a cover-up at the local level and raised the

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[2] Thus, the four national press articles cited by petitioner on page 5 of his petition, never would have been written but for the Senate investigation.

distinct possibility of cooperation by federal personnel in the cover-up. At present, the Committee is exploring the extent of the cover-up, following leads wherever they may lead.

The Senate investigation was so successful and unimpeachable that the federal government launched a third investigation which culminated in criminal indictments against ten policemen who were active participants in the Cerro Maravilla operation.

The success of the Senate investigation came about despite entrenched, obstinate and stubborn opposition and obstruction from all corners of the Executive Branch, from the Governor down. The Senate was forced to go to Court on countless occasions to gain access to pertinent documentary evidence and to force witnesses to testify. It was also taken to court, both federal and local, by witnesses, by members of the Executive Branch and even by the minority Senators of the Judiciary Committee, who are members of the Governor's party.[3]

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[3] What follows is a list of all cases, of both descriptions. The salient point is that the Senate ultimately emerged victorious in *all* of them. *Soto* v. *Romero Barceló, Hernández Agosto, intervenor,* no. 79-236 (D.P.R., March 16, 1981), *rev'd sub nom. In Re San Juan Star Company,* 662 F.2d 108 (1st Cir. 1981); *Hernández Agosto* v. *Cartagena (Cartagena I),* PE-81-1101 (P.R. Super, June 29, 1982); *Peña Clos* v. *Cartagena (Cartagena II),* PE 82-425 (P.R. Super; March 18, 1983), *rev'd,* 83 JTS 83 (P.R. S.Ct., Oct. 3, 1983); *Hernández Agosto* v. *Cartagena (Cartagena III),* PE 83-229 (P.R. Super., Oct. 14, 1983); *Colón Berrios* v. *Hernández Agosto,* No. 83-1493 (D.P.R., Jul[illegible], 1983), *rev'd,* 716 F.2d 85 (1st Cir. 1983); *Santiago* v. *Hernández Agosto,* PE-83-875 (P.R. Super., Sept. 7, 1983); *Hernández Agosto* v. *González Pérez,* PE-83-1338 (P.R. Super., Oct. 11, 1983); *Pérez Casillas* v. *Hernández Agosto,* PE-83-1361 (P.R. Super., Oct. 18, 1983), *Hernández Agosto* v. *Montañez,* PE-83-1379, (P.R. Super., Oct. 20, 1983); *Reverón Martínez* v. *Hernández Agosto,* PE-83-1272 (P.R. Super., Oct. 25, 1983); *Hernández Agosto* v. *Méndez Rivera,* PE-83-1316 (P.R. Super., Oct. 31, 1983); *Hernández Agosto* v. *Reverón Martínez,* PE-84-317 (P.R. Super., March 12, 1984); *Marrero Bonilla* v. *Comisión Estatal de Elecciones,* Civil No. 84-1060 (P.R. Super.,

These are the facts which gave rise to the instant suit. After six long years, during which he persisted in calling the Maravilla policemen heroes, made all sorts of attempts to undermine and derail the Senate investigation, steadfastly refused to name a special independent prosecutor to conduct a true, impartial criminal investigation of the Maravilla events, and pressed for the resignation of two Secretaries of Justice who felt otherwise, Governor Romero, on December 8, 1983, ordered petitioner, his subordinate, to take exclusive jurisdiction of all administrative and criminal investigations of the Cerro Maravilla events.

It is in this context that the petitioner's demand for "all evidence given to the Judiciary Commission related with the happenings of July 25, 1978 on Cerro Maravilla . . . , as well as any other documentation or statements related to these facts" (Pet. 2b), was evaluated and denied by the Puerto Rico courts under the Puerto Rico Constitution's legislative immunity clause.

Contrary to the assertion on Pet. 8 n.1, it was never at all clear whether petitioner demanded access only to the evidence which the Committee has already made public or whether he also demanded the evidence in the possession of respondent Rivera Cruz, with which he is still working, and

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March 16, 1984), *cert. denied*, 0-84-191 (S. Ct. P.R., March 19, 1984); *Romero Barceló* v. *Hernández Agosto*, PE-84-357 (P.R. Super., March 23, 1984), *rev'd*, 84 J.T.S. 35 (S. Ct. P.R., May 1, 1984); *Santiago* v. *Hernández Agosto*, Civil No. 84-460 (P.R. Super., May 29, 1984); *Hernández Agosto* v. *Martínez Acosta*, PE-84-657 (P.R. Super., June 6, 1984); *Hernández Agosto* v. *Colton Fontán*, PE-84-656 (P.R. Super., May 22, 1984); *Hernández Agosto* v. *Betancourt*, PE-84-986 (P.R. Super., July 19, 1984); *Hernández Agosto* v. *Rivera Rodríguez*, PE-84-1110 (P.R. Super., August 10, 1984); *Hernández Agosto* v. *Romero Barceló*, PE-84-1128 (P.R. Super.), *removed* to Federal District Court, Civil no. 84-2186 (D.P.R. pending), consolidated with *Romero Barceló* v. *Hernández Agosto*, Civil No. 84-2186 (D.P.R.).

which has yet to be made public by the Committee.[4] The petition, literally read, seemed to demand access to both and the trial court so understood it. Yet, in his motion for rehearing before the trial court, petitioner repeatedly stated that he only demanded access to "those documents which are in the possession of said Legislative Commission, and which have been made public by it, related to the Cerro Maravilla case." Motion for Rehearing, Superior Court of Puerto Rico, Civil No. 84-619 (902), March 27, 1984, p. 1, par. 3. See also pp. 7, 11 and 15. Worse still, he framed his first question on appeal to the Puerto Rico Supreme Court in those very terms ("evidence publicly divulged by the Commission") (Brief on Appeal, p. 4) and persistently used language to that effect in his April 17, 1984 Brief on Appeal. See pp. 2, 4, 5, 8, 15, 22, 25 and 29. In his "Opposition to Motion to Dismiss the Appeal" of May 10, 1984, p. 2-3, petitioner again reiterated that he only sought access to "that evidence divulged in the public hearings held by the Judiciary Committee and to that evidence originally received in executive session and later made public." He went as far as to state that this had been his posture at all stages of the suit. *Id.*

It was through his motion of May 11, 1984 that petitioner informed the Supreme Court of Puerto Rico otherwise. On page 2 of said motion, he stated:

> "The right of petitioner-appellant to obtain *all* evidence in the possession of the Senate Judiciary Com-

[4] As a matter of fact, a substantial part of such evidence has not been presented yet *to the Committee itself*, following the strict secrecy rules approved by the Committee for carrying on the investigation. At this late stage of the suit, it is evident that the petitioner is *most* interested in this evidence. His reasons are quite obvious. That evidence deals not with the assassination, but with its cover-up by the Executive Branch of the Commonwealth government. To file and prosecute murder charges, petitioner has more than enough evidence produced and made public by the Senate investigation and to which he has access under the judgment of the Supreme Court of Puerto Rico. (Pet. 5a)

> mittee is clear. Petitioner-appellant always has asked for all evidence in the possession of the Committee . . .''[5]

It was on this confused record, full of equivocal statements by herein petitioner as to the remedy sought, that the Supreme Court of Puerto Rico held that petitioner had a right of access to evidence publicly divulged by the Commission, but that the legislative immunity clause of the Puerto Rico Constitution prevented his access to evidence not yet made public. (Pet. 5a).

Petitioner timely moved twice for reconsideration of the Supreme Court judgment, on June 1 and June 18, 1984. Both motions were denied on June 14 and June 27, 1984, respectively. (Pet. 1c, 1d). It was only on the second motion for reconsideration, of June 18, 1984, that petitioner first attempted to raise an alleged federal question, to wit, that Public Law 600 of July 3, 1950, 64 Stat. 314, 48 U.S.C., Secs. 731b-731e (hereafter ''P.L. 600'') required that the Constitution which Puerto Rico was thereby enabled to draft ''provide a republican form of government.'' 48 U.S.C., Sec. 731c. From this it follows, it was claimed, that all issues of separation of powers which arise under the Puerto Rico Constitution of 1952 really arise under federal law. This ''federal question'' first raised before the Supreme Court of Puerto Rico in a second motion for reconsideration, after judgment, is renewed before this court.

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[5] In their May 11, 1984 Motion, attorneys for petitioner claimed that the text of that motion originally formed part of the seven-paragraph May 10, 1984 motion, as its eighth paragraph, but that somehow it had been dropped inadvertently. Whoever compares both motions, structurally as well as analytically, will have much more than a lingering doubt as to the accuracy of the claim of inadvertent omission. The motions are simply contradictory. This of course, presents an ethical question of the exclusive competence of the Supreme Court of Puerto Rico. It must be pointed out that counsel of record for petitioner before this Court played no role in the litigation before the Puerto Rico courts.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THIS COURT LACKS JURISDICTION OVER THE PETITION

A. The Question Tendered in the Petition Under Public Law 600 Was Not Properly and Timely Presented to the Supreme Court of Puerto Rico

The Supreme Court of Puerto Rico rendered its judgment on May 22, 1984 (Pet. 1a). Prior to that judgment, no federal question had been raised in the trial court or in the Puerto Rico Supreme Court. An attempt to raise a federal question was not made until the second motion for reconsideration filed by petitioner before the Puerto Rico Supreme Court on June 18, 1984, as petitioner himself admits before this Court. (Pet. 4, par. 3). It was denied without opinion on June 27, 1984. (Pet. 1d). It is renewed here as one of two "distinct reasons [why] this Court has jurisdiction to review the decision below under Section 1258(3) . . ." (Pet. 4).

The jurisdictional provision relied on in the petition, 28 U.S.C., Sec. 1258(3), grants jurisdiction to review final judgments of the Supreme Court of Puerto Rico by writ of certiorari ". . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States." The jurisdiction so conferred upon this Court is identical to its jurisdiction to review the final judgments or decrees of state courts under 28 U.S.C., Sec. 1257(3).[6] As under Sec. 1257(3), the "specially set up

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[6] Section 1258 of the Judicial Code is copied almost verbatim from the provisions in Section 1257. It was adopted ". . . in view of the change of the status of Puerto Rico from that of a territory to that of an associated Commonwealth under the Act of Compact" and for the purpose of providing for ". . . review [of] final judgments or decrees of the Supreme Court of Puerto Rico on certiorari or appeal in the same manner as judgments from the highest courts of the several States of the Union are now reviewed by [the Supreme] Court." Sen. Rep. No. 735, 87th Cong., 1st

or claimed" provision in Sec. 1258(3) requires that the federal question be timely and properly presented to the Commonwealth Supreme Court. If the question is not so raised and the Supreme Court of Puerto Rico declines to consider it, this Court is without jurisdiction to review the judgment on writ of certiorari. See *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969).

Ordinarily, the proper and timely presentation requirement is not satisfied when, as here, the federal questions were raised for the first time after judgment by the Supreme Court of Puerto Rico, upon a motion for reconsideration or petition for rehearing, and that Court did not entertain nor decide the federal questions so advanced. See *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935); and *Forbes* v. *State Council of Virginia*, 216 U.S. 396, 399 (1910).[7]

Sess., August 14, 1961. This Court's Rule 54 provides that "[t]he term 'state court' when used in the Rules of this Court, normally includes . . . the Supreme Court of the Commonwealth of Puerto Rico (See 28 U.S.C., Secs. 1257, 1258), and references in these Rules to the law and statutes of a State normally include the law and statutes . . . of the Commonwealth of Puerto Rico."

[7] As stated by this Court, if the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. See *Street* v. *New York*, 394 U.S. 576, 582 (1969). In the present case the Puerto Rico Supreme Court's denial of petitioner's motion for reconsideration, without deciding the federal questions raised therein, was based undoubtedly upon its established practice not to consider or decide questions raised for the first time in a motion for reconsideration addressed to a judgment previously rendered. See *Blanco* v. *Hernández*, 18 P.R.R. 699 (1912); *Oronoz* v. *Montalvo*, 20 P.R.R. 256 (1914); *Saurí* v. *Saurí*, 39 P.R.R. 810, 813 (1929); *Vázquez* v. *Martinó*, 46 P.R.R. 297, 298 (1934); *Ramos* v. *Sucesión Serrallés*, 51 P.R.R. 350, 351 (1937); and *Boerman* v. *Herederos de Boerman*, 53 P.R.R. 211, 213 (1938). The Court has gone further. For a long time it has refused to consider on appeal questions—constitutional or statutory—which were not presented to the trial court. See, *e.g.*, *P.R. Housing Au-*

Petitioner makes no attempt to justify his belated assertion of the alleged federal question. Obviously, he cannot claim that the federal question was born of a "surprise" decision of the Puerto Rico Supreme Court. Cf. *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930). It is also obvious that the federal law under which the alleged federal question arises is not a new development. Petitioner's alleged federal question arises under a statute dating from 1950, which has not been the subject of any amendments by Congress. Thus, there was no reason, and petitioner does not attempt to provide one, why the alleged federal claim could not have been raised at the trial court level.

The party seeking review must carry the burden of proving that the federal questions raised in the petition for certiorari were timely and properly presented to the courts below. Rule 21.1(h). See, *e.g.*, *Street* v. *New York*, 394 U.S. 576, 582 (1969). Petitioner has made no such affirmative showing. Indeed, the opposite has been clearly demonstrated. The alleged federal question under P.L. 600 was not raised at the proper juncture in the Commonwealth courts. This Court lacks jurisdiction over such question.

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thority v. *Sagastivelza*, 71 P.R.R. 406, 409 (1950); *Commonwealth* v. *Aguayo*, 80 P.R.R. 534, 576 (1958), quoting approvingly from *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346 (1935) (Brandeis, J); *Heirs of Escalera* v. *Barreto*, 81 P.R.R. 580, 589 (1959); *Zalduondo* v. *Iturregui*, 83 P.R.R. 1, 12 (1961); *Heirs of Castillo* v. *Descartes*, 83 P.R.R. 94, 104-05 (1961); *People* v. *Torres*, 86 P.R.R. 239, 242-43 (1962); *Murcelo* v. *H. I. Hettinger & Co.*, 92 P.R.R. 398, 412 (1965); *People* v. *Torres*, 98 P.R.R. 5, 8 (1969); *Galarza Soto* v. *E.L.A.*, 109 D.P.R. 179, 180-81 n.1 (1979). Only in exceptional, unusual cases, has the Court ruled otherwise in order to prevent a miscarriage of justice. See, *e.g.*, *Pueblo* v. *Santiago*, 106 D.P.R. 1, 4 (1977); *Abintestato Marini Pabón*, 107 D.P.R. 433, 439-40 (1978).

B. Even if it Had Been Timely Presented, this Court Would Lack Jurisdiction Over the Public Law 600 Question Since it is a Non-Justiciable Political Question and it Presents No Federal Question.

Petitioner lays great emphasis on the phrase contained in section 2 of P.L. 600, requiring that the Constitution for Puerto Rico provide for a republican form of government. 64 Stat. 314, 48 U.S.C., sec. 731c.[8] From such language, petitioner infers that the term "republican form of government" comprises the doctrine of separation of powers, and that these concepts were somehow violated by the Puerto Rico courts. All this artful pleading is evidently designed to federalize the purely local controversy between the Executive and Legislative branches of the Commonwealth government and to lead this Court to believe that it has a federal question before it. The problem with petitioner's argument is that it ignores both history and applicable case law.

1. The Public Law 600 Claim Presents a Non-Justiciable Political Question.

We have searched in vain the legislative history of P.L. 600 to find the purpose or intent of Congress regarding the meaning of section 2. Given this dearth of guidance in the legislative history, one may fairly conclude that Congress intended that phrase to have the same meaning as the Guaranty Clause of Art. IV, sec. 4 of the Constitution, which guarantees to every State of the Union a Republican Form of Government.

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[8] Petitioner erroneously refers to 48 U.S.C., Sec. 731b *et seq.*, as the Puerto Rico Federal Relations Act. (Pet. 2) In fact, the term Puerto Rican Federal Relations Act refers only to those sections of the Organic Act of 1917 which remained in effect after the approval of P. L. 600. See P.L. 600, Sec. 4; see also H. Rep., No. 2275, 81st Cong., 2d Sess., as quoted in H. Rep. No. 1832, 82d Cong., 2d Sess., 1952 U.S. Code Cong. & Ad. News at 1894. Petitioner's alleged federal question, therefore, would arise under P. L. 600, not under PRFRA.

Except for a brief period during Reconstruction, the authority contained within the confines of that clause has been largely unexplored. See, W. Wiecek, *The Guarantee Clause of the U.S. Constitution* (1972). Nonetheless, existing case law interpreting the Guaranty Clause does not support petitioner's contentions. Quite the contrary is true.

In *Luther* v. *Borden*, 7 How. (48 U.S.) 1 (1849), this Court established the doctrine that questions concerning the guarantee of a republican form of government are political, not judicial, in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character." 7 How. at 42.

The very few cases where the Court has gone beyond the justiciability issue are of no aid to petitioner. For instance, in *Minor* v. *Happersett*, 21 Wall (88 U.S.) 162 (1875), this Court stated, at 175:

> "The guaranty is of a republican form of government. *No particular government is designated as republican, neither is the exact form to be guarantied, in any manner especially designated.* Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.
>
> The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, *the people participated to some extent, through their representatives elected in the manner specially provided.* These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the State to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution." (Emphasis added).

Later on, in *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891), this Court stated what it considered to be the essence of the concept:

> By the constitution, a republican form of government is guarantied to every state in the Union, and *the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.* (Emphasis added).

Finally, in *Forsyth* v. *Hammond*, 166 U.S. 507 (1897), this Court held that a republican form of government does not require, contrary to petitioner's contention, the establishment of a strict system of separation of powers, and that legislative powers could be delegated.

Since *Forsyth*, this Court has remained firm in its view that the concept of a republican form of government presents a non-justiciable political question and has emptied the clause of any judicially cognizable meaning. The most recent holding in this respect is *Baker* v. *Carr*, 369 U.S. 186 (1962), where this Court clearly held that questions regarding the concept are non-justiciable because their resolution has been committed to Congress. See especially 369 U.S. at 223.

The lesson to be learned from this review of the principal cases on the subject is clear. The "republican form of government" concept is associated with the right of the people to freely elect the officers of their own government; that is to say, it is identified with the principle of government by consent of the governed. See generally, J.J. Rousseau, *The Social Contract* 39 (W. Kendall Trans. 1959). The only two Supreme Court cases dealing substantially with the concept so hold, as pointed out above. And one of them, *Duncan* v. *McCall*, calls it "the distinguishing feature of that form". 139 U.S. at 416.

We have been unable to find any case holding that the separation of powers among the coordinate branches of government is an inherent or even an important part of a government republican in form. The cases which have some-

times been cited for such a proposition do not even mention the words "republican form of government." Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976); *United States* v. *Nixon*, 418 U.S. 683, 705-714 (1974).

Indeed, federal cases may be found holding that states are not required to abide by the doctrine of separation of powers. See, e.g., *Parcell* v. *Kansas*, 468 F. Supp. 1274, 1277 (D. Kan. 1979); *aff'd sub nom. Parcell* v. *Governmental Ethics Com'n*, 639 F. 2d 628 (10th Cir. 1980).

The second clear lesson that one must gather from the cases examined is that the meaning of the phrase is for Congress to decide. Even those authors who have offered new and revolutionary theories of the Guaranty Clause accept this fact. See *e.g.*, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L.J. 561, 562 (1984).

2. The P.L. 600 Claim Does Not Present a Federal Question

Given the history and meaning of the Guaranty Clause, it would be mistaken to conclude, as petitioner urges upon this Court, that Congress intended to radically change the doctrine established by the decisions of this Court when it included the language of the Guaranty Clause in P.L. 600. Several facts contradict such an argument. First, it is clear from the legislative history that both the President and Congress approved the Constitution of Puerto Rico after finding that it duly conformed with all of the requirements of P.L. 600 and that it provided for a republican form of government. Public Law 447, Joint Resolution Approving the Constitution of Puerto Rico, 66 Stat. 327 (1952). See in particular the 4th and 5th "whereas". See also, 1952 U.S. Code Cong. and Ad. News, at 1892-1902. In short, the body which according to the decisions of this Court is the only arbiter of Guaranty Clause issues has sanctioned the Constitution of Puerto Rico. It is too late in the day for peti-

tioner to challenge such sanction, let alone to do so before this Court.

Second, the issues in this case turn upon the proper interpretation of the Constitution originally approved by Congress. Such document has not been amended or revised in any way pertinent to this controversy. Hence, the condition established in P.L. 447 to the effect that any future amendment to the Constitution would have to be consistent, *inter alia*, with P.L. 600, is irrelevant to the resolution of the present case.

Two cases have been brandished before this Court to support the contention that the requirement of a "republican form of government" in P.L. 600 is a justiciable federal question and presents a separation of powers issue: *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189 (1928), and *Camacho* v. *Civil Service Commission*, 666 F. 2d 1257 (9th Cir. 1982). (Pet. 14-15, n.3). We respectfully submit that both cases are clearly inapposite.

Springer is a controversy regarding the powers granted to the legislative and executive branches of the Philippine Islands government under the Organic Act of 1916, 39 Stat. 545, which at that time constituted the fundamental law of the Philippines and was to all effects and purposes its Constitution. 277 U.S. at 200. In short, in *Springer* this Court was required to interpret the federal statute which at the time established the whole structure of the Philippine government in all its details.

At no time does *Springer* even mention the concept of a republican form of government, nor does it link such a concept with separation of powers principles. In fact, all that *Springer* stands for is the proposition that under the doctrine of separation of powers, *as embodied in the Organic Act*, the legislative branch may not exercise executive authority by retaining the power to appoint those who will execute its laws. See *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976). That a justiciable issue arising under a statute

enacted by Congress is a federal question is plain. It also plainly does not support petitioner's contention.

The *Camacho* case is also distinguishable in several respects. First, it involved the appellate jurisdiction of the Court of Appeals for the Ninth Circuit over courts sitting in the Northern Mariana Islands (hereafter "NMI") and its role as interpreter of a local law dealing, as in *Springer*, with the appointment by the legislature of some executive officials. In view of the specific language of the Congressional statute, the Court of Appeals held that it had appellate jurisdiction. 666 F. 2d at 1259-1262. It should be stressed that *Camacho* presented no justiciability issues and that federal law clearly authorized federal courts to decide issues of local law.

But more importantly, the other issue involved in *Camacho* was *not* whether the government of the NMI was republican in form, *nor* whether such form of government required separation of powers, but rather whether, unlike the States, it was bound by the federal doctrine of separation of powers because of the explicit requirements of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States. 48 U.S.C. sec. 1681 note.

The Court of Appeals found that the explicit language of the covenant created "a republican government of separate powers". 666 F. 2d at 1263. In this respect it is significant to note that section 203(a) of the Covenant contains a crucial requirement which clearly differentiates it from those contained in P.L. 600. It reads:

> "The Constitution will provide for a republican form of government *with separate executive, legislative and judicial branches*, and will contain a bill of rights." 48 U.S.C., sec. 1681 note. (Emphasis added).[9]

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[9] Moreover, in this very section Congress went on to specify the nature and structure of the separate branches to be established. Such specifications are absent from P.L. 600.

It is obvious that the italicized language is absent from P.L. 600. Likewise as obvious is that Congress must have understood that in order to require three separate branches in the NMI government it had to include specific language to that effect. Thus, the NMI Covenant proves two things. First, that for Congress the terms "republican form of government and "tripartite separation of powers" are not synonymous, nor does the former comprise the latter. Second, that when Congress used the former term in P.L. 600 it did not mean to require Puerto Rico to adopt the federal system of three separate branches. That decision was alone for Puerto Rico to make. The fact that Puerto Rico did adopt the federal model does not make any Puerto Rican separation of powers issue a federal question. Puerto Rico, just like the States, is free to follow whatever course it deems proper in the interpretation of the concept of separation of powers, unhampered by federal strictures.

Therefore, given the crucial difference in language between the Covenant and P.L. 600, one can hardly argue that *Camacho* stands for the proposition that a republican form of government inherently includes a concept of separation of powers or any particular interpretation of that concept.

The present case is totally different from both *Springer* and *Camacho*. Since 1952 Puerto Rico is no longer governed by an Organic Act imposed by Congress. Rather, it is governed under a Constitution adopted by the people of Puerto Rico to organize their government as part of a federal plan geared to provide for Puerto Rico's ever increasing self-government.[10] In fact, and quite pertinent to this case, the sections of the Organic Act of 1917 which P.L. 600 repealed were "the provisions of the act concerned

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[10] For a thorough review of this process, see Lacovara, *The Authority of the Commonwealth of Puerto Rico under the United States Constitution to Join International Organizations and to Enter into International Agreements*, 11 Rev. Jur. U.I.A. 449, 456-469 (1977).

primarily *with the organization of* the local executive, legislative, and judicial branches of the government of Puerto Rico and *other matters of purely local concern.*" H. Rep. No. 2275, 81st Cong. 2d Sess., as quoted in H. Rep. No. 1832, 82d Cong. 2d Sess., 1952 U.S. Code Cong. & Admin. News at 1894 (Emphasis added).[11]

Thus, it is clear that *Springer* dealt with an interpretation of the sections of an organic act which in the case of the Philippine Islands, corresponded precisely with those similar sections of the former Puerto Rico Organic Act which Congress specifically repealed in 1952, because they were matters of purely local concern best dealt with by Puerto Rico itself. And the *Camacho* case dealt with a quite differently worded covenant.

Given these facts, it is patently erroneous to argue that the requirement of P.L. 600 that the Constitution of Puerto Rico provide for a republican form of government, whatever its true meaning, was intended to allow a federal Court to consider it a basis for a justiciable controversy and do a *Springer*-like interpretation of such matters of purely local concern as the organization, powers, and relationship of the legislative and executive branches under the Constitution of Puerto Rico. If that were the case, the phrase would serve to bring through the back door what Congress repealed through the front door. Intellectual dishonesty should not be imputed so lightly to Congress. See *Figueroa v. People of Puerto Rico*, 232 F. 2d 615, 620 (1st Cir. 1956).

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[11] See also S. Rep. No. 1720, 82 Cong., 2d Sess. 6-7 (1952), quoted approvingly in Lacovara, *supra* note 10, at 465. Law review author Lacovara states:

> "There is . . . no way to answer categorically the elusive question of precisely how to characterize the constitutional status of the Commonwealth of Puerto Rico. The single conclusion about which one can be certain is that the Commonwealth's status under the 1950-1952 Compact is *sui generis*, with many aspects of plenary autonomy in its domestics affairs similar to the authority of States, while it is also subject to the direct legislative jurisdiction of Congress, except to the extent congressional enactments are, in the vague words of the PRFRA, 'locally inapplicable'." *Id.*, at 469.

In fact, such an interpretation of both P.L. 600 and the Constitution of Puerto Rico is inadmissible because it ignores more than 30 years of the history of the constitutional relationship between Puerto Rico and the United States. As the First Circuit, so experienced in these matters, recently held: "The [PRFRA] and the Puerto Rico Constitution were intended to work a significant change in the relation between Puerto Rico and the rest of the United States." *Córdova & Simonpietri, Ins.* v. *Chase Manhattan Bank,* 649 F. 2d 36, 39 (1st Cir. 1981). And this Court itself has held that "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with a State of the Union . . ." *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero,* 426 U.S. 572, 594 (1976); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974); *Rodríguez* v. *Popular Democratic Party,* 102 S. Ct. 2194, 2199 (1982) ("At the same time, Puerto Rico, like a State, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution'.").[12]

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[12] Also very pertinent are the following assertions found in Lacovara, *supra* note 10:

> "[I]t was the express contemplation of the United States Government and the Puerto Rican people through their representatives at the time the Compact was proposed and accepted, that the autonomy being given to Puerto Rico was essentially local in nature and that the United States would have continued responsibility for international security and foreign-affairs matters affecting Puerto Rico." *Id.*, at 462.
>
> "[The] Compact provides for full autonomy, within a union with the United States and subject to continuing United States responsibility for Puerto Rico's 'foreign affairs' and military security." *Id.*, at 506.
>
> "Whatever was true of pre-Commonwealth status . . . , something legally and political (sic) significant happened to its status as a result of the 1950-1952 Compact." *Id.*, at 511.

One of those significant changes was precisely "partial freedom from Congressional control, since the local branches of government are not created nor its officials appointed by the federal government, and the laws of the local legislature are not subject to Presidential or Congressional veto." García-Passalacqua, *The Legality of the Associated Statehood of Puerto Rico,* 4 Inter Am. L. Rev. 287, 303-304 (1962), quoted approvingly in

Given these holdings, it may not be insisted that the strictures of "a republican form of government" should apply to Puerto Rico in a radically different fashion than to a State. But that is precisely what petitioner is urging this Court to do. Petitioner pretends that this Court put aside all pertinent precedents and hold that in Puerto Rico, unlike in a State, the meaning of the term republican form of government presents a justiciable controversy, that said term requires something more than a popularly elected government, and that any issue of separation of powers within the Commonwealth government is itself a federal question.

Such pretensions should be summarily rejected by this Court. Here, as was similarly held by the First Circuit in *Córdova & Simonpietri, supra,* there are no discernible reasons of any kind for treating Puerto Rico differently:

> "[G]iven a general Congressional intent to grant Puerto Rico state-like autonomy, we believe that there would have to be specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post Constitutional Puerto Rico than into the local affairs of a state." 649 F. 2d at 42.

Lastly, the full breadth of petitioner's claim under P.L. 600 must be explored. Section 2 of P.L. 600 does not require only that the Commonwealth Constitution provide a republican form of government. It also requires a bill of rights. Thus, if petitioner's arguments were followed to their logical conclusion, this Court would have jurisdiction to review not only issues of separation of powers arising in disputes

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Lacovara, *supra*, at 512, who additionally termed the Compact and its changes irrevocable by unilateral action of the Congress. *Id.*, at 511, 513, 514.

Since 1977, when the law review article cited *supra* nn. 10-12 was written, there have been no changes in the Commonwealth status. Even some of the Commonwealth's attorneys in Washington have remained the same. See *id.* at 452 n.*. Only the administrations in control of the Executive Branch of the Commonwealth have changed.

among branches of the Commonwealth government; it could review also any claim by any person who alleged that his or her rights under the Commonwealth Constitution had been violated. The meaning of "sovereign over matters not ruled by the Constitution," *Rodríguez* v. *Popular Democratic Party*, 102 S. Ct. 2194, 2199 (1982), would then be nothing but a tasteless joke. Congress, in the words of Judge Magruder, would have perpetrated "a mounmental hoax" on Puerto Rico. *Figueroa* v. *People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

C. The Judgment Below Is Based Upon Adequate and Independent Puerto Rican Constitutional Law Grounds and May Not Be Reviewed by this Court Under Settled Jurisdictional Principles.

Petitioner asserts that the Puerto Rico courts treated the Puerto Rico Constitution's legislative immunity clause, P.R. Const. Art. III, Sec. 14, as having the same meaning and effect as the Federal Constitution's Speech or Debate Clause, U.S. Const. Art. I, Sec. 6. (Pet. 3). He then claims that the trial court rested its judgment "principally on its interpretation of this Court's decisions" under the Federal Speech or Debate Clause (Pet. 7) and that the Puerto Rico Supreme Court, although it only cited Art. III, Sec. 14 of the Puerto Rico Constitution, likewise relied on federal precedents since it stated that the trial court " 'based its findings on an exhaustive analysis of the applicable Constitutional doctrines.' " (Pet. 8, citing App. 2a). From this, petitioner concludes that this Court has jurisdiction to review the judgment below and, under the standards of the Speech or Debate Clause, correct any misinterpretation of federal law and remand the case so that the Puerto Rico Supreme Court "may reconsider the state law question free of misapprehensions about the scope of federal law." (Pet. 3, quoting from *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 104 S. Ct. 2267, 2277 (1984).

It is submitted that petitioner errs in his interpretation of the holdings of the Puerto Rico courts and of this Court's treatment of the doctrine of adequate and independent state grounds. The decision below rested solely on Puerto Rico constitutional law, in a situation where federal law is totally inapplicable, and may not be reviewed by this Court.

At all stages of this litigation it was crystal-clear to all parties that only the Puerto Rico legislative immunity clause was in issue. Respondents' motion to dismiss before the trial court was solely predicated on that basis. (Motion to Dismiss, pp. 2-3). Their brief reviewed federal cases under the Speech or Debate Clause, not because that clause was in any way involved in this litigation or compelled its result, but because of the light such cases might shed on the proper interpretation of the Puerto Rico legislative immunity clause. Petitioner also recognized this as a fact in his appearances both before the trial court (Motion for Reconsideration, pp. 3-4, 6)[13] as well as before the Supreme Court of Puerto Rico (Brief on Appeal, pp. 4, 5, 6, 13).

It is in this context that the references in the trial court opinion to federal cases must be understood. The trial court prefaced its discussion of these cases with the holding that herein petitioner could not prevail under "the Doctrine of Parliamentary Immunity contained in Section 14 of Article

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[13] On pages 3-4 of that Motion, petitioner quoted Art. III, Sec. 14 of the Commonwealth Constitution, quoted from *In re Rodríguez Torres*, 106 D.P.R. 698 (1978), which interpreted said clause, and went on to state:

> "It is due to its origins [the Puerto Rico legislative immunity clause] in Anglo-American common law, that we will refer to a line of cases which establish the judicial doctrine developed by the Supreme Court of the United States." (Our translation).

A similar statement was made on the Brief on Appeal before the Puerto Rico Supreme Court (p. 6). Thus, from the very outset petitioner himself recognized that it was proper to rely on federal cases under the Speech or Debate Clause for guidance and not because they compelled any result in the Puerto Rico constitutional context. See *Michigan* v. *Long*, 103 S.Ct. 3469, 3476 (1983).

No. 3 (sic) of the Constitution of the Commonwealth of Puerto Rico." (Pet. 3b). Its reasoning did not merely rely on federal cases. It also relied on three local cases[14] and on a French constitutional law text. (Pet. 3b, 4b, 7b, 9b). On appeal, the Supreme Court of Puerto Rico was even more precise. It held that "[i]n respect to the evidence that has not been made public, it is not proper that we intervene in an area of recognized parliamentary immunity. Article 3, Sec. 14, Constitution, Commonwealth of Puerto Rico." (Pet. 5a). That was the *only* authority cited by the Court in its opinion.

Petitioner, in a desperate attempt to assail this obviously adequate and independent state ground, urges this Court to interpret that the Puerto Rico Supreme Court's neutral description of the trial court opinion ("the appealed (sic) court based its findings on an exhaustive analysis of the applicable Constitutional doctrines") (Pet. 2a) constituted a reliance on federal law for the interpretation of state law and that its judgment, therefore, may be reviewed by this Court under *Michigan* v. *Long*, *supra* (hereafter "*Long*"). That strained interpretation of the judgment below would disregard the purposes of the *Long* doctrine.

Long is this Court's latest attempt to restate the adequate and independent state grounds jurisdictional doctrine. Its main thrust was thus stated by this Court:

> "Accordingly, when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not

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[14] *In re Rodríguez Torres*, 106 D.P.R. 698 (1978); *Banco Popular, Liquidador* v. *Corte*, 63 D.P.R. 66, 63 P.R.R. 63 (1944); *Peña Clos* v. *Cartagena*, 83 JTS 83 (1983). The first case dealt with the local legislative immunity clause in the context of a disbarment proceeding against an attorney who was also a legislator; the other two, in the context of the scope of the legislative investigatory powers.

> clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Long, supra,* 103 S. Ct. at 3476.

Unlike in *Lona*, where the state court "referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law," 103 S. Ct. at 3474, the court below relied only on the Puerto Rico Constitution and made no reference at all to the Federal Constitution or to federal cases. Moreover, although the trial court did refer to federal cases, it clearly formulated its holding as based exclusively on the Puerto Rico Constitution (Pet. 3b, quoted *supra*). Also unlike *Long*, where the references to the Michigan Constitution were coupled with references to the Federal Constitution, 103 S. Ct. at 3474 n. 3, here there was no such coupling in the trial court opinion and no reference at all to the Federal Constitution in the opinion below. Thus, "the independence of the [Puerto Rico constitutional] ground is . . . apparent from the four corners of the opinion." *Long, supra,* 103 S. Ct. at 3475.

As this Court has recognized, *Three Affiliated Tribes* v. *Wold Engineering*, 104 S. Ct. 2267, 2276-2277 (1984) (hereafter "*Wold*"), there are two distinct instances where the adequate and independent state grounds doctrine does not preclude its review, in the context of a state court interpretation of state law which has been influenced by an accompanying interpretation of federal law. The first instance is when the state court construes a "state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements." *Wold, supra,* 104 S. Ct. at 2276. The second instance is when the state court construes the "state law broadly in the belief that federal law poses no barrier to the exercise of state authority." *Id.*, at 2277. None of these instances is here present.

The first instance is obviously inapplicable since the courts below admittedly construed the Puerto Rico legislative immunity clause broadly. The second instance is not applicable for a different reason. The fact is that the Puerto Rico Supreme Court did not *believe* that federal law posed no barrier to its interpretation of the scope of the local immunity clause; the Court *knew this for a fact*, and has known it for a long time.[15]

It is settled law that the Federal Speech or Debate Clause is not applicable to state legislators and that any immunity they may have, as pertains to a suit in state court, is grounded exclusively on local law. *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U.S. 391, 404 (1979). The Puerto Rico Supreme Court has recognized this fact at least twice. In *In re Rodríguez Torres*, 106 D.P.R. 698 (1978), quoted by the trial court in this case, the Puerto Rico Supreme Court made a thorough exposition of the principles of legislative immunity created by the Puerto Rico Constitution. First, it explored the history and interpretation of the Federal Speech or Debate Clause. 108 D.P.R. at 705-709. Then it went on to explore the language, history and interpretation of the local clause, 108 D.P.R. at 716-720, not without first stating that its objective was to ascertain "whether our constitutional order requires a different treatment of the problem under discussion to that given in the United States." 108 D.P.R. at 712. After its analysis of the origins and development of the local clause, the Court concluded

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[15] Petitioner's reliance on *Wold* and on *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942) (Pet. 3), is thus misplaced. In both cases the state courts interpreted state law after engaging in a wrong interpretation of applicable federal law. This Court corrected their interpretation of federal law and remanded the cases to permit the state courts to interpret the state law "free of misapprehensions about the scope of federal law." *Wold*, *supra*, 104 S. Ct. at 2277. In the case at hand the courts below were surely right in their belief that no federal law is applicable to a claim of local legislative immunity in a suit brought by the local executive branch. See *infra*.

that the 1951 Constitutional Convention rejected all efforts to shrink the local legislative immunity, but instead reinforced it, 108 D.P.R. at 717; that our local clause "descends from the parliamentary immunity clauses of the Anglo-Saxon tradition," 108 D.P.R. at 718; that the Constitutional Convention retained and even strengthened, the privilege, 108 D.P.R. at 719; and that "our constitutional order preserved a broad field for the privilege of parliamentary immunity, *at least* as broad as it is recognized in United States case law." 108 D.P.R. at 721 (emphasis ours).

The second pertinent case is *Romero Barceló, Governor* v. *Hernández Agosto, Senate President*, 84 J.T.S. 35 (1984), decided just three weeks before the judgment below. The Court held that the local legislative immunity required the dismissal of a suit brought by the Governor to enjoin the televised broadcast of the Cerro Maravilla hearings. In so holding, the Court once again made a broad construction of the local clause and held that it comprised activities where the legislators "scrutinize the government, debate issues of general interest and inform the country on the course of public affairs." *Id.*, at 3569. It specifically recognized that legislation is not the sole or even the principal function of a Legislature. Of equal importance and rank, it held, are the following functions: investigation, oversight, discussion and information. *Id.* This holding undoubtedly goes a great deal beyond anything this Court has held under the Speech or Debate Clause. Compare to *Doe* v. *McMillan*, 412 U.S. 306 (1973); *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979); *Gravel* v. *United States*, 408 U.S. 606 (1972).[16]

In light of these holdings it is simply impossible to conclude that the Puerto Rico Supreme Court felt compelled by

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[16] The Court expressly recognized that the Speech or Debate Clause of the United States Constitution does not apply to the States nor to Puerto Rico. It cited *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 404 (1979), for that proposition. 84 J.T.S. 35 at 3571.

federal law to rule as it did in this case, when just three weeks earlier it had made an expansive interpretation of the local clause and had specifically stated that its interpretation was not dependent on its federal counterpart.

We submit that the lone citation of the local constitutional clause in the opinion below is a "plain statement" of a "bona fide separate, adequate, and independent ground," *Long, supra*, 103 S. Ct. at 3476, which prevents this Court from exercising appellate jurisdiction in this case. *Long's* objective of reducing federal-state conflicts as well as delay in judicial administration, 103 S. Ct. at 3475, would not be well served if state courts were required to make their "plain statement" in a particular, ritualistic language. If this Court were to hear this case, it would render an unnecessary advisory opinion, also contrary to *Long's* purposes, 103 S. Ct. at 3476, only to see the judgment reinstated by the court below on local grounds. Only a perversion of the *Long* holding would sustain such a course of action. See generally, Comment, *Michigan* v. *Long: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision*, 69 Iowa L. Rev. 1081 (1984).[17]

For all these reasons it is submitted that this Court lacks jurisdiction over the petition for certiorari and should dismiss it.

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[17] The trial court's exposition of federal cases, which was not specifically endorsed by the Puerto Rico Supreme Court, cannot be the subject of review in this Court. If this Court were to correct any misinterpretation of federal law found in a state court opinion, when the state court used federal law merely for guidance, it would incessantly issue advisory opinions on a host of difficult, complex problems. This Court expressly rejected such a course of action in *Long*. See 103 S. Ct. at 3476.

II. THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION WHICH THIS COURT SHOULD HEAR

Since respondents are convinced of this Court's lack of jurisdiction over the petition for certiorari, they will address the merits briefly, but will go directly to the heart of this case.

Even if this Court were to hold, somehow, that there is a timely, properly presented and justiciable federal question before it, and not solely issues of Puerto Rican law, the petition still would not merit this Court's attention. Petitioner's arguments against the application to this case of the concept of absolute legislative immunity under the Speech or Debate Clause might, *arguendo*, make more sense in another case. They are certainly out of place in this one.

This is not an ordinary case where the Executive Branch needs access to "every man's evidence", *United States v. Nixon*, 418 U.S. 683, 710 (1974), to prosecute a violation of the criminal law. (Pet. 13). That premise conveniently forgets the real facts of this case, as previously described, and with which the courts below were undoubtedly familiar.

Unlike *Nixon*, here we do not face a clash between a particularized claim for access to evidence of criminal wrongdoing, in the one hand, and a generalized claim of constitutional privilege, in the other. (*Id.*). Instead, we have a generalized, all-comprehensive demand by the Executive Branch for any and all evidence which a legislative committee may have gathered and not made public yet, obtained in a legitimate, long-awaited, major investigation of criminal wrongdoing by some of the highest officers in the Executive Branch itself. Facing this generalized demand is a legislative claim of immunity from having to reveal to citizens not above suspicion the evidence and leads the committee may have gathered, before the investigators have finished their evaluation of such evidence and have pursued such leads to wherever these may take them.

Petitioner's federal analogy is not apt. This case is not at all similar to *United States* v. *Nixon, supra*. It would resemble much more a case which, fortunately for the Federal government, never did occur. Its caption would have been *Nixon* v. *Senate Select Committee on Watergate and House Judiciary Committee*. Indeed, the real issue in the present case is whether the Governor of Puerto Rico can take the Senate of Puerto Rico to court and force it to reveal to him whatever evidence it may have gathered against him, before its investigation is complete.

That is what makes this case unique, and uniquely inappropriate for this Court's consideration.

This Court should not go out of its way to decide whether, in a hypothetical clash between the President and Congress, an exception to absolute legislative immunity should be recognized.[18] That highly important issue of federal constitutional law should await its day. The President and Congress are not now before this Court, nor is any issue involving them. Such an important issue of federal constitutional law should not be decided in a case where only members of Puerto Rico's legislative and executive branches are parties, where the issue was not timely or properly presented to the lower courts, and where the adequate and independent state grounds doctrine would most probably deprive the judgment of this Court of any concrete effect.

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[18] Petitioner's protestations notwithstanding, this Court has squarely ruled that there is indeed absolute congressional immunity from suit when Congressmen or their aides are sued as a result of legitimate legislative activities such as legislative investigations. *Eastland* v. *United States Servicemen's Fund* 421 U.S. 491, 504-05 (1976). See also *Tenney* v. *Brandhove*, 34[illegible].S. 367, 377-78 (1951). In the case at bar, petitioner very early and expressly refused to question the legitimacy of the Senate investigation. Motion for Reconsideration, Superior Court of Puerto Rico, pp. 6-7. Thus, even if federal law ruled this case, which is does not, *Eastland* and *Tenney* would preclude this suit against these respondents.

CONCLUSION

The petition for certiorari should be dismissed for lack of jurisdiction or, in the alternative, denied in the exercise of this Court's discretionary jurisdiction.

Respectfully submitted.

In San Juan, Puerto Rico, this 12th day of October, 1984.

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